Supreme Court U.S.
FILED

No. 981371 FEB 25 '99

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1998

OSWALDO (GIL) MEDEROS and MARIO MEDEROS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN C. YODER
Route 5, Box 109
Harpers Ferry, WV 25425
(304) 535-6842

J. THOMAS BURCH, JR.
Counsel of Record
WILLIAM T. BENNETT
BURCH & CRONAUER, P.C.
1200 19th Street, NW
Suite 401
Washington, DC 20036
(202) 293-7150

Attorneys for Petitioners

151495

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

34pp

QUESTIONS PRESENTED

Is the attorney-client privilege waived as to prior conversations concerning a particular transaction between an attorney and clients with whom he has had a prior and subsequent relationship, once the attorney advises the clients he is not representing them in that transaction.

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Appendix A — Summary Order Of The United States Court Of Appeals For The Second Circuit Dated And Filed December 1, 1998 ..... 1a

Appendix B — Judgment In A Criminal Case Of The United States District Court For The Eastern District Of New York Dated March 20, 1998 ..... 7a

Oswaldo (Gil) Mederos and Mario Mederos petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit appears at Appendix A to the petition and is unpublished.

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals entered its judgment was December 1, 1998. No petition for rehearing was timely filed in petitioners' case. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 501, Federal Rules of Evidence states:

Rule 501 — General Rule

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

STATEMENT OF THE CASE

This Petition by Oswaldo (Gil) Mederos and Mario Mederos arises out of their business transactions with Cumberland Packing Corporation (hereinafter "Sweet n' Low"), best known as the manufacturer of the Sweet n' Low Sugar Substitute. Petitioners allege that they were wrongfully convicted of crimes [as hereinafter described] because their attorney was permitted to testify, over objection, concerning conversations and legal advice he had with them concerning contracts they executed with the Sweet n' Low manufacturer.

The attorney was one Joseph Dornbush.[1] In 1985, the Mederos brothers and Joseph Asaro formed three corporations: Penultimate Associates, Exim Associates and Proteus Associates ("Proteus"). Each of the three took one third of the stock interest in each of these corporations. They retained Mr. Dornbush to provide advice and assistance, while drafting the necessary legal instruments.

The attorney continued to represent all three of them in other matters. Later in 1985, he handled the closing of the purchase of an office building at 231 East 50th Street in New York City. Over a year later, he attended a meeting between the three stockholders to discuss an issue concerning the mortgage on the building. Mr. Dornbush then went on to represent the Mederos brothers with respect to two corporations, both of which were apparently named Rainbow Folding Box and Printing Corporation and continued this representation until the end of 1993. Mr. Dornbush also represented Joseph Asaro as an individual in a land purchase in 1986.

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1. At the time of trial, Mr. Dornbush's license to practice law had been suspended.

In the middle of this period, between June and September 1988, the Mederos brothers and Joseph Asaro became involved in negotiations to adjust charges and billings between themselves or their corporations and Sweet n' Low.

On October 14, 1988. Sweet n' Low, Proteus, Joseph Asaro and the Mederos brothers entered into a Shareholders Agreement. The Agreement included representations that, commencing January 1, 1984, Sweet n' Low had paid misallocated expenditures to Proteus. The agreement recited that Joseph Asaro was indebted to Sweet n' Low in the amount of $100,000 and the Mederos brothers in the respective amounts of approximately $95,000 and $120,000; Proteus was indebted to Sweet n' Low in the amount of $2.95 million. The Proteus debt was assumed by the three individuals, in consideration of various payments to them by Sweet n' Low.

Under this Agreement, benefits also flowed in the other direction. Sweet n' Low paid Gil Mederos $75,000 and transferred title to a company car and paid Mario Mederos $102,000. Sweet n' Low also agreed to release the Mederos brothers and Joseph Asaro from all liability.

Various collateral agreements were also executed on October 14, 1988, such as the accompanying promissory note, a sale of that note to its principal stockholder, the sale of all the stock in Proteus to the principal shareholder of Sweet n' Low and various instruments of transfer, including a trade of the promissory note for a building.

Also executed on October 14, 1988, was a letter prepared by Mr. Dornbush on his letterhead (Government Exhibit 1967; A187-88) and signed by himself and all signatories (all of whom were clients) to the foregoing agreements. This letter stated:

Gentlemen:

Reference is made to the transactions entered into among you, pursuant to various documents of even date:[2]

By signing below, you hereby acknowledge the following:

1. I have represented each of you at various times in the past; however, I am only representing Cumberland Packing Corp. in connection with this transaction.

2. I have requested that each of you retain your own attorney, however, you have refused to do so and have advised me that you desire to proceed with the transaction without an attorney.

3. I have advised you that a potential conflict may exist and you hereby release me from any and all claims in connection with such conflict and in connection with this transaction.

Yours truly,

Mr. Dornbush was never informed that either Mederos brother had retained an attorney, nor did he ever see either one of them accompanied by an attorney. Mr. Dornbush admitted that he was concerned about a possible conflict of interest when he was drafting the 1988 transaction. Even the accountant retained by both Sweet n' Low and Rainbow felt that he had a conflict of interest in doing both corporations' books.

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2. The documents are not identified in the letter. Nor were they appended to the letter. Thus, the "transaction" referred to is never identified in the course of seeking release from the conflict of interest.

Mr. Dornbush never received any letter in writing advising him that the Mederos brothers had relieved him as counsel. He acknowledged that the foregoing letter signed by all parties did not relieve him as counsel for the Mederos brothers.

In a second transaction between the Mederos interests through one of their Rainbow corporations and Sweet n' Low, Dornbush again represented Sweet n' Low, drafting approximately 50 agreements in the course of that relationship.

Rainbow and Sweet n' Low were still doing business with each other as of the trial of the Mederos brothers.

Subsequently, the Mederos brothers were indicted in the Eastern District of New York. Following a jury trial, on July 20, 1998, they were both convicted of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 and income tax evasion in violation of 26 U.S.C. § 7201. Oswaldo Mederos was convicted of an additional count of obstruction of justice in violation of 18 U.S.C. § 1503.

The key to the prosecution's case was the Shareholders Agreement and the related instruments that were signed on October 14, 1988. At the trial, the prosecutors introduced last minute testimony by Mr. Dornbush, who had not testified before the grand jury, to explain the transactions envisaged by these agreements. He testified that the execution of these agreements was preceded by between 10 or 15 meetings pertaining to the negotiations and processing of the contract and related instruments, which involved various of his clients. The prosecutors proceeded to elicit testimony concerning agreements between the attorney and his retained accountant, confidential communications from the Mederos brothers concerning the rationale behind their negotiating positions and a confidential communication from Gil Mederos concerning

disposition of a promissory notes. He also testified to various confidential communication from Joseph Asaro, the co-stockholder of the Mederos brothers, which included Asaro's requesting advice on the propriety of sales between certain affiliates and an admission that 'certain things had to be brought out' (which pertained to billing practices by the three men's corporations).

The Mederos brothers made timely objection to his testimony and moved to exclude his testimony on grounds of attorney-client privilege and conflict of interest. In the course of making the objections, it was also noted that the attorney-client privilege was broader than a mere restriction on testimony concerning confidential communications. Ultimately, defense counsel moved for a mistrial unsuccessfully. Mr. Dornbush denied that he had made explanation of the agreements to the Mederos Brothers and Joseph Asaro. Counsel for the Mederos brothers was permitted to conduct voir dire of the witness but an evidentiary hearing was not ordered pursuant to which Mr. Dornbush, the Mederos brothers and possibly other witnesses could have all testified concerning the scope of the attorney-client relationship.

Following voir dire, the testimony was admitted after the United States attorney represented to the Court: "[T]he only conversations again are when third parties are present that he's going to testify about." This was a misrepresentation by the U.S. Attorney, because all of the third parties were either clients represented by Mr. Dornbush or employees of those clients.

The Court of Appeals interpreted the record before it as signifying that the Mederos brothers were not entitled to assert attorney-client privilege because Mr. Dornbush was not representing them during the settlement negotiations with Sweet n' Low. It concluded that the conversations between Mr.

Dornbush and the Mederos brothers took place immediately prior to signing the agreements and transpired in the presence of third parties. The Court of Appeals found the communications between the Mederos brothers and Mr. Dornbush consisted of settlement demands to be relayed to the adverse party. It placed great stress on the waiver of any potential conflict by reason of the waiver Mr. Dornbush had the Mederos brothers execute.

In the absence of a hearing on the attorney-client privilege issue, the Court of Appeals concluded that

> [N]o attorney client-relationship was established. Moreover, there is no evidence that Oswaldo and Mario Mederos sought any legal advice from Dornbush while negotiating the settlement agreement with him.

REASONS FOR GRANTING THE WRIT

The Court of Appeals decision denying the application of the attorney-client privilege is important and warrants this Court's review because the holding effectively denies persons the right to consult with attorneys about business negotiations over matters that could potentially entail criminal exposure. The decision thus defeats the fundamental purpose of the attorney-client privilege, which is to encourage full and frank communications between attorneys and clients and thereby promote observance of law and the administration of justice.

The Court of Appeals decision is wrong because it is based on a deficient record, which was constructed without a hearing on the merits of the Defendants' assertion of attorney-client privilege. The prosecutors' version of the parties' relationships prevailed, without appropriate opportunity for rebuttal. Once

he was permitted to testify, the cat was out of the bag. Rebuttal testimony by the Mederos brothers would have come too late in the game to exclude their lawyer's testimony. Thus, the Mederos brothers had no effective opportunity to set forth the facts concerning the full scope of Mr. Dornbush's representation of both themselves and all other persons who were privy to any conversations and the nature of the communications between the Mederos brothers and their lawyer. Nor could it be demonstrated that he would have acquired information highly relevant to his subsequent adverse testimony as a result of prior representation of the Mederos brothers and that he necessarily would have provided confidential advice and explanation concerning those documents, which would plainly fall under the attorney-client privilege.

Petitioners respectfully submit that had these issues been addressed by the Court, prior to Mr. Dornbush's testimony, he would have been prevented from testifying and divulging privileged information. While it is true that the Mederos brothers executed a waiver of conflict of interest (albeit a nebulous, unspecific waiver), this waiver only occurred at the end of the transaction, after the conflict (and any still privileged communications) had occurred. Further, a waiver of a conflict of interest is not the same as a waiver of the attorney-client privilege. The privilege was never waived in this case.

The attorney-client privilege is among the oldest common law privileges dating back to the 16th Century. 8 J. Wigmore, Evidence (McNaughton rev. edition 1961), Sec. 2290. It exists for the purpose of encouraging full and truthful communication between the attorney and his client and "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981).

The privilege is governed by the principles of the common law as it may be interpreted by the courts of the United States. Fed. R. Evidence, Rule 501. Thus, it has been uniformly held that the attorney-client privilege belongs to the client. *United States v. Partin*, 601 F.2d 1000 (9th Cir. 1979), *cert. denied*, 446 U.S. 964, 100 S. Ct. 2939, 64 L. Ed. 2d 822 (1980); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967). *See generally* Strong, McCormick on Evidence (4th ed.), Sec. 92.

In communicating with Mr. Dornbush, the Mederos brothers clearly believed that certain of their communications would be privileged consultations with an attorney, even if he at some point had informed them of his view that he was not representing them during the transaction at issue. Compare *Wylie v. Marley Co.*, 891 F.2d 1463 (10th Cir. 1989) (confidential communication by person believing himself to be entitled to attorney-client relationship precedes counsel's disclaimer of legal representation). As noted above, the letter which Mr. Dornbush had his clients, including the Mederos brothers, execute, in which he formally disavowed legal representation of anyone other than Sweet n' Low, came after he had discussed confidential matters with the brothers.

In cases where the attorney has testified without client authorization, or where waiver has been asserted by a party seeking to compel testimony as a result of unauthorized disclosure of client confidences by the attorney, that testimony has been disallowed. *Schnell v. Schnall*, 550 F. Supp. 650 (S.D.N.Y. 1982) (upon a finding of privilege, remand to determine which portions of testimony are privileged). An involuntary disclosure is no disclosure.

This principle is no different than the position that a privileged document retains its privileged status even though

it has been disclosed publicly after having been stolen. *Sackman v. Liggett Group, Inc.*, 173 F.R.D. 358 (E.D.N.Y. 1997); *Mayman v. Martin Marietta Corp.*, 886 F. Supp. 1243, 1246 (D. Md. 1995); *Fayemi v. Hambrecht and Quist, Inc.*, 174 F.R.D. 319 (S.D.N.Y. 1997).

Similarly, many (albeit not all) courts will protect the confidential status of documents subject to the attorney-client privilege which have been disclosed through inadvertence. *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 938 (S.D. Fla. 1991); *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 954 (N.D. Ill. 1982); *Helman v. Murray's Steaks, Inc.*, 728 F. Supp. 1099 (D. Del. 1990). Numerous other courts conditionally protect the privilege, imposing a test taking into consideration such factors as the reasonableness of the precautions taken to prevent inadvertent disclosure, the number and extent of inadvertent disclosures, the promptness of measures taken to rectify the disclosures and the interests of justice. *Allread v. City of Grenada*, 988 F.2d 1425, 1433 (5th Cir. 1993); *Gray v. Bickell*, 86 F.3d 1472 (8th Cir. 1996); *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984).

Even in cases of voluntary disclosure of privileged information to a regulatory agency, many courts have either supported the paramount importance of encouraging disclosure to the agency, *see, e.g.*, *In re Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc); *Byrnes v. IDS Realty Trust*, 85 F.R.D. 679 (S.D.N.Y. 1980); *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368 (E.D. Wisc. 1979), or have refused to infer a waiver thereby if the right to assert the privilege is specifically reserved at the time the disclosure is made). *Teachers Insurance and Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981).

To the extent that certain (but not all) communications by the Mederos brothers to Mr. Dornbush were divulged with authorization to his co-clients, those communications may still retain a privileged status. Wigmore proffers the hypothetical of a communication by A to X as his attorney. At the same time, X is the attorney for B, who then becomes the party opponent of A. The communication will ordinarily be regarded as privileged

> because of the relation of X towards A. Nor does the fact of A's knowledge that X is already B's attorney, nor the fact of B being already adversely interested destroy the privilege. This is so, although X ought not to undertake to act for both in any matter where there is a possibility of adverse interests, nonetheless A is protected by reason of the relation.

8 Wigmore, Evidence (McNaughton rev. edition 1961), Sec. 2312.

In this case the Mederos brothers did not waive the privilege at any time. Indeed, they objected to Mr. Dornbush's testimony. To the extent that their communications were disclosed to third parties, the communications would fall within the zone of confidentiality afforded by the "common interest" privilege. *See, e.g., Hodges, Grant & Kaufman v. U.S. Government*, 768 F.2d 719, 721 (5th Cir. 1985) ("The privilege is not, however, waived if it is shared with a third person who has a common legal interest with respect to the subject matter of the communication.").

Further, the prosecutors clearly discussed all of these matters with Mr. Dornbush before they put him on the witness stand. Thus, the attorney-client privilege had already been compromised prior to the presentation of the government's case

and quite conceivably may have pointed the prosecutors or their investigators in new directions in the search for evidence with which to convict the Petitioners. Thus, the taint of the improperly admitted attorney-client privileged evidence may extend to other material evidence, as well.

Thus, the government intentionally procured confidential attorney-client privileged communications, and these communications were produced as evidence at the trial of the Mederos brothers. These communications may have been otherwise applied to the detriment of the two Petitioners at their trial. There was at least a realistic possibility that the prosecution benefitted from these unauthorized disclosures and that the Mederos brothers were prejudiced thereby. Accordingly, the exclusionary rule should be applied and a new trial ordered. *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977); *Black v. United States*, 385 U.S. 26, 87 S. Ct. 190, 17 L. Ed. 2d 26 (1966).

To hold otherwise, as did the Court of Appeals, is to subject the attorney-client privilege to the threat of progressive erosion. No client should have to expect that his attorney, to whom he comes in the expectation of confidentiality of the discussions, will then be the government's star witness against him in a future criminal proceeding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

J. THOMAS BURCH, JR.
Counsel of Record
WILLIAM T. BENNETT
BURCH & CRONAUER, P.C.
1200 19th Street, NW
Suite 401
Washington, DC 20036
(202) 293-7150

JOHN C. YODER
Route 5, Box 109
Harpers Ferry, WV 25425
(304) 535-6842

Attorneys for Petitioners

APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED DECEMBER 1, 1998

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of December, one thousand nine hundred and ninety-eight.

PRESENT:

HON. GUIDO CALABRESI,
HON. ROBERT D. SACK,
HON. SONIA SOTOMAYOR,
Circuit Judges.

98-1181(L), 98-1183

UNITED STATES OF AMERICA,

Appellee,

v.

OSWALDO MEDEROS, aka GIL MEDEROS, and MARIO MEDEROS

Defendants-Appellants,

SUMMARY ORDER

Appendix A

Appearing for Appellants: IRVING ANOLIK, New York, NY

Appearing for Appellee: RICHARD T. FAUGHNAN, Assistant United States Attorney, Eastern District of New York, Brooklyn, NY

Appeal from the United States District Court for the Eastern District of New York (Sterling Johnson, Jr., *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Oswaldo and Mario Mederos ("Mederos brothers") appeal from a judgment of conviction entered on March 20, 1998, following a jury trial in the United States District Court for the Eastern District of New York (Johnson, *J.*) for conspiracy to defraud the United States in violation of 18 U.S.C. § 371 and income tax evasion in violation of 26 U.S.C. § 7201.[1]

I

The Mederos brothers were responsible for many of the key management decisions at Cumberland Packing Corporation ("Cumberland") which produces the sugar substitute Sweet'N Low. Oswaldo was Cumberland's chief financial officer, and Mario was the company's purchasing agent and plant manager. In the mid-1980s, the Mederos brothers entered into a scheme with Joseph Asaro, Cumberland's Vice-president, to defraud

1. Oswaldo Mederos was also convicted of obstruction of justice in violation of 18 U.S.C. § 1503.

the company by submitting false receipts. To carry out this plan, Asaro and the Mederos brothers formed a variety of shell corporations whose only function was to submit receipts to Cumberland for reimbursement. In his role as financial officer, Oswaldo would approve the false purchases and allow Cumberland's money to flow into the shell corporations controlled by the three Cumberland officers. As a result, Cumberland claimed deductions for business expenses that did not exist and the officers conducting the fraud received large amounts of unreported income.

In 1988, the conspiracy began to unravel. The United States Attorney's office issued subpoenas to Cumberland concerning its business dealings with the shell companies controlled by Asaro and the Mederos brothers, while information about the fraud reached Cumberland's president, Marvin Eisenstadt. Asaro then went to Eisenstadt and revealed the scheme. Eisenstadt, nevertheless, decided that he did not want to fire the guilty employees or to pursue legal action.

Eisenstadt instead hired Joseph Dornbush, an attorney, to represent Cumberland and to negotiate a restitution agreement between the company and its three wayward officers. According to Dornbush's testimony — the only evidence in the record on these issues — Dornbush had previously represented Asaro and the Mederos brothers in some unrelated legal matters, but he advised them that in this negotiation he was representing only Cumberland and that they should retain their own counsel. Asaro and the Mederos brothers chose not to do so. Following the successful conclusion of the negotiations, Asaro and the Mederos brothers signed a document prepared by Dornbush that stated:

Appendix A

1. I have represented each of you at various points in the past, however, I am only representing Cumberland Packing Corp. in connection with this transaction.

2. I have requested that each of you obtain your own attorney, however, you have refused to do so and have advised me that you desire to proceed with the transaction without an attorney.

3. I have advised you that a potential conflict may exist and you hereby release me from any and all claims in connection with such conflict and in connection with this transaction.

Despite reaching a settlement with Cumberland, Asaro and the Mederos brothers continued to defraud the company by submitting false receipts for reimbursement over the next four years.

At the trial of Oswaldo and Mario Mederos for fraud and tax evasion, the government called Attorney Dornbush to testify about the negotiations leading to the 1988 settlement agreement. Over the defendants' objection, Dornbush testified about the nature of his prior representation of the Mederos brothers and Asaro, his retention by Cumberland, his conversations with Asaro and Eisenstadt concerning the embezzlement, the settlement negotiations and documents (including specific demands made by the Mederos brothers), and the waiver signed by the Mederos brothers.[2]

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2. Contrary to counsel's assertion at oral argument, Dornbush's conversations with the Mederos brothers regarding the contents of the settlement documents were not confidential, but rather took place immediately prior to signing and in the presence of third parties.

Appendix A

II

The Mederos brothers contend on appeal that Dornbush's testimony violated the Sixth Amendment right to counsel and the attorney-client privilege by disclosing statements made by them to their attorney in confidence. These claims are without merit and we affirm.

The attorney-client privilege claim is unavailing for the simple reason that Dornbush was not representing the Mederos brothers during the settlement negotiations with Cumberland. As a result, there was no attorney-client relationship that could be breached by Dornbush's testimony about those negotiations. Dornbush made it quite plain that, at the time, he was representing Cumberland, and the Mederos brothers signed a statement to that effect. That statement also waived any potential conflict created by Dornbush's prior representation of the Mederos brothers in other matters. As noted, the only evidence in the record below on these issues was Dornbush's testimony that he represented only Cumberland and had, prior to the signed waiver, informed the Mederos brothers of this fact. On appeal, the Mederos brothers contend that the waiver was invalid. However, they did not proffer any contrary testimony to the district court, nor did they request a hearing. It follows that, on the record before the district court, no attorney client-relationship was established. Moreover, there is no evidence that Oswaldo and Mario Mederos sought any legal advice from Dornbush while negotiating the settlement agreement with him. Instead, they simply conveyed their demands to Dornbush, and he in turn conveyed those to his client Cumberland. Relaying a party's settlement demands does not, in any sense, create an attorney-client relationship with that party. Dornbush's testimony, therefore, did not implicate

or infringe upon any attorney-client privilege held by Oswaldo and Mario Mederos.

Even assuming *arguendo* that Dornbush was acting as the attorney for the Mederos brothers in the discussions with Cumberland, Dornbush's testimony could not have violated any Sixth Amendment interest since the right to counsel does not extend to private negotiations between parties. *See Kirby v. Illinois*, 406 U.S. 682, 688 (1972) ("[I]t has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.") (plurality opinion). At the time Dornbush allegedly served as Oswaldo and Mario's attorney, they were not facing any judicial proceedings. Instead, they were negotiating a private settlement with their employer. No constitutional right was implicated, therefore, by Dornbush's alleged representation or by his subsequent testimony.

We have considered all of Oswaldo and Mario Mederos' arguments and find them to be without merit. The judgment of the district court is therefore affirmed.

For the Court:

CAROLYN CLARK CAMPBELL,
Clerk

by s/ Ralph A. Anderson
Ralph A. Anderson
Acting Operations Manager

APPENDIX B — JUDGMENT IN A CRIMINAL CASE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED MARCH 20, 1998

UNITED STATES DISTRICT COURT
Eastern District of New York

CASE NUMBER: 97 CR 0317(SJ)

UNITED STATES OF AMERICA

V.

OSWALDO MEDEROS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Irving Anolik, Esq., 225 Broadway, NY, NY 10007
Defendant's Attorney

THE DEFENDANT

* * *

✓ was found guilty on count(s) one two three and four of the indictment after a plea of not guilty.

Appendix B

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 371	Conspiracy to Defraud the IRS	1994	1
18 U.S.C. § 1503	Obstruction of Justice	05/93	2
26 U.S.C. § 7201	Income Tax Evasion	03/12/91 04/09/92	3 4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence imposed pursuant to the Sentencing Reform Act of 1984.

* * *

× All open courts are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Appendix B

Defendant's Soc. Sec. No.: 093-34-7683	03/20/98 Date of Imposition of Judgment
Defendant's Date of Birth: 09/01/40	s/ Sterling Johnson, Jr. Signature of Judicial Officer
Defendant's USM No.: unknown	Sterling Johnson, Jr., U.S.D.J. Name & Title of Judicial Officer
Defendant's Residence Address: 10 St. Andrews Court Old Westbury, Long Island 11568	03/20/98 Date

* * *

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty (60) months on each of counts 1, 3, 4 and a term of one (1) month on count 2. Terms of imprisonment imposed on counts 3 & 4 to run concurrent to each other and consecutive to count 1. In addition, the term of imprisonment imposed on count 2 is to run consecutive to the total term of imprisonment imposed on counts 1, 3, and 4 for a total term of imprisonment of one hundred and twenty one (121) months.

* * *

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* The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

  * before 2 p.m. on 5/4/98.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years on each count to run concurrent for a total of three (3) years imprisonment.

SPECIAL CONDITIONS OF SUPERVISED RELEASE:

1 - Pay back taxes
2 - Full financial disclosure

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.
The defendant shall not illegally possess a controlled substance.
For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

Appendix B

* * *

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instruction of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

Appendix B

6) The defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol;

8) The defendant shall not frequent places where controlled substance are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix B

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine
Totals:	$200.00	$100,000.00

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order, (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

* * *

C × Not later than one year from the date of this judgment; or

* * *

The defendant will receive credit for all payments previously made toward any criminal monetray penalties imposed.

* * *

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period

of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

* The court adopts the factual findings and guideline application in the presentence report.

* * *

Guideline Range Determined by the Court:

Total Offense Level: 32

Criminal History Category: 1

Imprisonment Range: 121-151

Supervised Release Range: 2-3 years

Fine Range: $17,500.00 to 43,459,169.58

* * *

* The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s): The lower end of the guideline is sufficient for deterrence and punishment.

* * *